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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/626,636	07/27/2000	Gary Karlin Michelson M D	102.0003-04000	6124

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EXAMINER
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SEVERSON, RYAN J

ART UNIT	PAPER NUMBER
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3731

MAIL DATE	DELIVERY MODE
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01/20/2011

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 09/626,636	<b>Applicant(s)</b> MICHELSON M D, GARY KARLIN	
	<b>Examiner</b> RYAN J. SEVERSON	<b>Art Unit</b> 3731	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 01 November 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 172-176, 178-181, 183-192, 197-200, 202-206 and 351-359 is/are pending in the application.
- 4a) Of the above claim(s) 185-189, 197-200, 203-206 and 351-359 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 172-176, 178-181, 183, 184, 190-192 and 202 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948)                        | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114 was filed in this application after appeal to the Board of Patent Appeals and Interferences, but prior to a decision on the appeal. Since this application is eligible for continued examination under 37 CFR 1.114 and the fee set forth in 37 CFR 1.17(e) has been timely paid, the appeal has been withdrawn pursuant to 37 CFR 1.114 and prosecution in this application has been reopened pursuant to 37 CFR 1.114. Applicant's submission filed on 11/1/2010 has been entered.

### ***Election/Restrictions***

2. Newly submitted claims 351-359 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: The newly presented method set is distinct from the apparatus set because the apparatus can be used in another and materially different process, for example being used to only deploy an implant between adjacent vertebral bodies or cut bone from one of a pair of adjacent vertebral bodies instead of cutting bone from two adjacent vertebral bodies.

3. Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 351-359 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. **Claims 172-176, 178-181, 183, 184, 190-192 and 202 are rejected under 35 U.S.C. 103(a) as being unpatentable over Froning (3,875,595) in view of Carson (4,414,962) and Brantigan (4,878,915).** Froning discloses an apparatus for use in performing human interbody spinal surgery (see title) comprising a guard (31) for providing guided access to a disc space (see figures 1-5), a distracting element (see column 2, lines 38-46) configured to distract two adjacent vertebral bodies having leading and trailing ends and upper and lower load-bearing surfaces, and an orientation pin (34 and 34a) for holding the guard to the spine (see figure 2).

6. However, Froning fails to disclose the guard having two passages. Attention is drawn to Carson, who teaches it is known to create an instrument for surgery on bone having multiple circular channels (72 and 73, see figure 3) to allow multiple instruments to be used in the surgical site at the same time. Therefore, one having ordinary skill in the art at the time the invention was made would have found it obvious to have made the guard of Froning with two passages as suggested by Carson to obtain the same advantage.

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7. Further, the combination fails to disclose a bone removal device. Attention is drawn to Brantigan, who teaches a bone removal device (21) that is passed through a guard (22) with an increased outer dimension and a footplate (see figure 4) to shape the vertebral bodies so that they accept an implant there between. Therefore, one skilled in the art at the time the invention was made would have found it obvious to have included a bone removal element with the device of the combination of Froning and Carson as suggested by Brantigan to obtain the same advantage.

### ***Response to Arguments***

8. Applicant's arguments with respect to claim 172 have been considered but are moot in view of the new ground(s) of rejection.

### ***Conclusion***

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to RYAN J. SEVERSON whose telephone number is (571)272-3142. The examiner can normally be reached on Monday - Friday 8:30-5:00.

10. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anhtuan Nguyen can be reached on (571) 272-4963. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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11. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Ryan J Severson/  
Examiner, Art Unit 3731  
1/18/11